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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 512

JOSEPH M. KAISER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FRED A. GARIEPY,
Counsel for Petitioner.

RAYMOND F. HAYES,
J. GLENN SHEHEE,
Of Counsel.

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OCTOBER TERM, A. D. 1943

No. .....

JOSEPH M. KAISER,

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

A.

Summary Statement of the Matter Involved.

On February 5, 1943, respondent indicted petitioner on two counts, charging violations of the Harrison Narcotic Act (26 U. S. C. A. 2554 (a)) (R. 2). A plea of not guilty was entered (R. 5), and trial by jury had.

At the conclusion of respondent's case in chief, petitioner moved "the court to instruct the jury to return a verdict of not guilty" (R. 21). The motion was denied and exception taken. The motion was renewed in the same words at the close of all the evidence (R. 41), was denied and exception taken.

Motions for a new trial (R. 80) and in arrest of judgment (R. 80) were made, denied, and exceptions preserved.

After judgment and sentence, petitioner filed his notice of appeal to the Circuit Court of Appeals, setting forth as his grounds, among others, (1) that the court erred in failing to direct a verdict of not guilty at the close of all the evidence; and (2) that the evidence affirmatively showed that petitioner was entrapped into committing the alleged offense (R. 81-82).

Petitioner's assignment of errors specified the failure of the trial court to direct a verdict of not guilty (R. 83), and charged that the verdict was based upon evidence which affirmatively showed that petitioner was entrapped by respondent to commit the supposed crimes (R. 85).

On appeal to the Circuit Court of Appeals, petitioner urged that the evidence was insufficient to support the verdict because it clearly and affirmatively established entrapment. Respondent maintained that this defense could not be considered by the appellate court because the record did not show it was before the trial court. Petitioner contended that his motions for a directed verdict tested the sufficiency of the evidence and that the appellate court had the right to and should consider the facts on the merits and ascertain whether the facts were sufficient to support the verdict. However, the Court of Appeals decided that a *general* motion, for a directed verdict, *stating no grounds*, is insufficient, and refused to consider the case upon its merits (R. 97).

A brief statement of the facts is contained in the supporting brief.

B.

Jurisdiction.

The judgment of the Circuit Court of Appeals was rendered on October 28, 1943. The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

C.

The Questions Presented.

1. Whether a general motion for a directed verdict in a criminal case, specifying no grounds, is sufficient to permit an appellate court to consider whether the evidence is sufficient to support a conviction, the petitioner contending that the facts admitted under the motion constitute entrapment and estop prosecution.

2. Whether the motion for a directed verdict should have been granted, on the ground that the facts establish entrapment and preclude prosecution.

D.

Reasons Relied on for the Allowance of the Writ.

1. The Court of Appeals has decided an important question of federal criminal law in a way probably not in accord with applicable decisions of this court. *Wiborg* v. *U. S.*, 163 U. S. 632; *Crawford* v. *U. S.*, 212 U. S. 183.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on the same matter. *Balaklala Consol. Copper Co.*

v. *Reardon,* 220 Fed. 584; *Ayers* v. *U. S.,* 58 Fed. (2d) 607; *Baltimore & O. R. Co.* v. *McCune,* 174 Fed. 991; *Reynolds* v. *U. S.,* 48 Fed. (2d) 762.

E.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on its docket, and that said judgment of said Court of Appeals be reversed by this honorable court, and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just.

JOSEPH M. KAISER,
Petitioner,

By FRED A. GARIEPY,
Counsel for Petitioner.

RAYMOND F. HAYES,
J. GLENN SHEHEE,
Of Counsel.